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ALTERNATIVE DISPUTE RESOLUTION

Arbitration & Mediation in non-Muslim Regions

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ALTERNATIVE DISPUTE RESOLUTION: ARBITRATION & MEDIATION IN NON-MUSLIM REGIONS

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ALTERNATIVE DISPUTE RESOLUTION

Arbitration & Mediation in non-Muslim Regions

Subject: Shari'ah-based personal dispute resolution for Muslims living in non-Muslim regions.

Significance: The Shari'ah provides several methods for resolving personal disputes. The most well-known and developed means is settlement by an appointed judge (*qadā*) in a courtroom. This option is not available to Muslims residing outside the historical regions of the Abode of Islam (*dār al-islām*). There is a need to examine what methods the Shari'ah offers and to assess their applicability as one way to improve the condition of Muslims living in non-Muslim regions.

Executive Summary: Dispute resolution remains a difficult issue for Muslims living in non-Muslim regions. While Muslims within Muslim regions do usually have access to Shari'ah-based personal dispute resolution through settlement in court by an appointed judge (*qāḍī*) whose judgments are binding and enforceable, the absence of such judges in non-Muslim regions leaves Muslims residing in such lands without this option. The problem is augmented by the widespread belief that an Islamic state's courts are the only acceptable means by which to obtain binding dispute resolution for Muslim litigants. The current state of affairs is particularly harmful to Muslim wives in abusive marriages, since it leaves them no means within the Shari'ah to rectify their situation.

This Analytic Brief will show that the classical schools of Islamic Law provide other options relevant to the current situation. The first part of this Brief will introduce the various models for personal dispute resolution which are covered in classical Islamic law. The second part of this Brief will then discuss the applicability of each model and present a possible strategy for their application in a manner that respects and is harmonious with both the Shari'ah and the legal environment of Muslims living in non-Muslim regions. The Brief will close by demonstrating how these models might be applied to the problem of Muslim wives caught in abusive marriages.

I. DISPUTE RESOLUTION MODELS

Classical Islamic law texts offer the following models for dispute resolution: private settlement (*ṣulḥ*), settlement by an appointed judge (*qadā*), and arbitration (*taḥkīm*). These

models are well accepted amongst the classical schools. Each of these models will be introduced along with details relevant to the topic, drawing mainly from the Shāfi'ī school for reasons that will become clear during the discussion of arbitration (*taḥkīm*).

1. Private Settlement (*ṣulḥ*)¹

In private settlement (*ṣulḥ*), individual parties agree to settle a disputed matter among themselves without recourse to a third party. The linguistic meaning of “*ṣulḥ*” is ending a dispute; its legal meaning is a contract through which this occurs. The textual basis for settlement comes from the Qur'an and Prophetic reports. Allah Most High says: *Settlement is best* [Q4:128]. The Prophet ﷺ said: “Making a settlement between Muslims is permitted, except one which legalizes what is prohibited or prohibits what is legal.”² Scholars of hadith and fiqh observe that this hadith applies to Muslims and non-Muslims alike, but that the report only mentions Muslims since they are the ones most likely to adhere to Shari'ah judgments.

Islamic law recognizes several types of settlement based upon the relationship of the parties involved, and each type is treated individually. These include: settlement between a Muslim state and a non-Muslim state; between the Imām and renegades; between husband and wife, and between parties to a financial transaction. Each type of settlement is given separate treatment in different chapters in the legal texts: *bāb al-hudnah*, *bāb al-bughāt*, *bāb al-qasam wa al-nushūz*, and *bāb al-ṣulḥ*, respectively.³ Only the last two are relevant to Muslims residing in non-Muslim regions.

2. Settlement by an Appointed Judge (*qadā*)⁴

The most common and powerful means for dispute resolution is through an appointed judge. One of the primary linguistic meanings of “*qadā*” is passing judgment; its legal meaning is resolving a dispute between two or more parties by applying Allah's judgment. Its textual basis comes from the Qur'an and Prophetic reports. Allah Most High says: *So judge between them by that which Allah hath revealed* [Q5:49], *but if thou judgest, judge between them with equity* [Q5:42], and *Lo! We reveal unto thee the Scripture with the truth, that thou mayst judge between mankind by that which Allah showeth thee* [Q4:105]. The Prophet ﷺ said: “When a

1. Al-Ramlī, Shams al-Dīn Muḥammad, and Yaḥyā bin Sharaf al-Nawawī, *Nihāyat al-Muḥtāj ilā Sharḥ al-Minhāj* (Cairo: Maktabah wa Maṭba'ah Muṣṭafā al-Bābī al-Ḥalabī, 1967), 4:240; Ibn 'Ābidīn, Muḥammad Amīn, and Muḥammad 'Alā' al-Dīn Effendī, *Hāshiyah Radd al-Muḥtār 'alā al-Durr al-Mukhtār: Sharḥ Tanwīr al-Abṣār*, 8 vols. 3 ed. (Egypt: Maktabah Muṣṭafā al-Bābī al-Ḥalabī, 1984), 8:221; al-Buhūṭī, Abū Maṣṣūr, *Kashshāf al-Qinā' 'alā Matn al-Iqnā'*, 5 vols. ed. Muḥammad Amīn al-Dīnnāwī (Beirut: 'Ālim al-Kutub, 1997), 3:102; 'Ulaysh, Muḥammad, *Sharḥ Manaḥ al-Jalīl 'alā Mukhtaṣar al-'Ālāmah Khalīl*, 5 vols. (Dār al-Ṣāḍir, n.d.), 3:200; al-Ḥaythamī, Ibn Ḥajar, and Yaḥyā bin Sharaf al-Nawawī, *Tuḥfat al-Muḥtāj bi Sharḥ al-Minhāj* (Beirut: Dār Iḥyā al-Turāth, n.d.), 5:231; al-Jamal, and Zakariyā al-Anṣārī, *Hāshiyat al-Jamal 'alā Sharḥ al-Minhaj* (Cairo: Maṭba'ah Muṣṭafā Muḥammad, n.d.), 3:350; al-Shirbinī, al-Khaṭīb, *Mughnī al-Muḥtāj ilā Ma'rifat Alfāz al-Minhāj* (Beirut: Dār al-Ma'rifah, n.d.), 2:230.
2. Ibn Ḥibbān, Muḥammad. *Ṣaḥīḥ Ibn Ḥibbān*, (Beirut: Mu'assisat al-Risālah, 1988), hadith no. 5182.
3. Al-Sharqawī, and Zakariyā al-Anṣārī, *Hāshiyat al-Sharqawī 'ala Tuḥfat al-Ṭullāb* (Cairo: Muṣṭafā al-Bābī al-Ḥalabī and Sons, 1941), 2:64.
4. Al-Ramlī, *Nihāyat al-Muḥtāj*, 8:200; Ibn 'Ābidīn, *Hāshiyah Radd al-Muḥtār*, 5:371; al-Buhūṭī, *Kashshāf al-Qinā'*, 5:249; 'Ulaysh, *Sharḥ Manaḥ al-Jalīl*, 5:136; al-Ḥaythamī, *Tuḥfat al-Muḥtāj*, 10:125; al-Jamal, *Hāshiyat al-Jamal*, 5:334; al-Shirbinī, *Mughnī al-Muḥtāj*, 4:497.

judge gives a ruling having tried his best to decide correctly, and his verdict is wrong, he will have a single reward; if his verdict is correct, he will have two rewards.”⁵

Imām al-Nawawī explains this narration in his commentary of *Ṣaḥīḥ Muslim*:

The scholars hold that Muslims have reached a consensus that this report concerns a judge who is a scholar and qualified to judge. If he is correct, he receives two rewards: one for exercising juridical reasoning (*ijtihād*), and one for being correct; but if he errs, he receives one reward for exercising juridical reasoning.... As for someone who is not qualified to judge, it is not permissible for him to judge, and if he does he shall receive no reward – indeed, he has sinned. His judgment is not effective, whether it agrees with the correct answer or not, because it does not originate from a legal basis in the Shari‘ah and is only correct out of coincidence. Thus, he is disobedient in all of his judgments whether they agree with [the Shari‘ah] or not. All of his judgments are rejected, and he has no excuse in any of this. A report has been transmitted in the *Sunan*: “Judges are of three types: one is in Paradise and two are in the Fire. A judge who knew what was right and judged according to it will be in Paradise. A judge who knew what was right and judged contrary to it will be in the Fire. And a judge who judged while ignorant will also be in the Fire.”⁶

This text emphasizes that there are standards that must be met before a judge and his judgments can be considered valid.

The conditions for being an Islamic judge (*qāḍī*) are that one be (1) qualified to offer court testimony, (2) capable, and (3) a qualified *mujtahid*. Explanatory texts clarify these conditions. “Qualified to offer court testimony” means the individual is Muslim, legally responsible, free, male, upright, and possesses the faculties of hearing and sight. “A qualified *mujtahid*” is an individual who knows the judgments of the Qur’an, Sunnah, analogy, and the various categories within each, and who also knows the status of transmitters. The qualified *mujtahid* must also possess knowledge of the Arabic language as well as the opinions of scholars of Sacred Law regarding matters of consensus and differences of opinion.⁷

These are the conditions according to the Shāfi‘ī school. While there is some variance among the schools of jurisprudence, there is agreement among them that it is essential that the individual be Muslim, adult, rational, and free.⁸

5. Al-Bukhārī, Muḥammad bin Ismā‘īl, *Ṣaḥīḥ al-Bukhārī*, 3 vols. (Cairo: Jam‘iyah al-Maknaz al-Islāmī, 2000), 3:1483, no. 7437; Ibn al-Ḥajjāj, Muslim, *Ṣaḥīḥ Muslim*, 2 vols. (Cairo: Jam‘iyah al-Maknaz al-Islāmī, 2000), 2:746–7, hadith nos. 4584–6.

6. Al-Nawawī, Yaḥyā bin Sharaf, and Muslim Ibn al-Ḥajjāj, *Sharḥ Ṣaḥīḥ Muslim*, 9 vols. 1 ed. (Cairo: al-Maṭba‘ah al-Misriyah bi-l-Azhar), 1929, 6:148, hadith no. 3240.

7. Al-Shirbīnī, *Mughnī al-Muḥtāj*, 4:375–7.

8. A summary of the conditions required by other schools is as follows:

- The Ḥanafīs add: having sight and speech, and never having deserved a punishment for accusing others of adultery (*qadhf*). While being male is not a condition in this school, female judges do not handle cases involving personal injury or punishable crimes.

If no individual possesses the above-mentioned qualifications and a powerful ruler appoints a Muslim who is unfit, the unfit judge's decisions are implemented out of necessity so as not to vitiate people's concerns and interests.

It is neither permissible nor valid to appoint as judge an individual whose unorthodoxy renders his testimony rejected, just as it is neither permissible nor valid to appoint as judge someone who rejects consensus, singular reports, or analogical reasoning.

It is also neither permissible nor valid to appoint a non-Muslim as a judge. Al-Khaṭīb al-Shirbīnī explains:

This requirement [i.e., being Muslim] is included within the requirement of being morally upright, which is why [Imām al-Nawawī mentioned “morally upright” but] did not mention “being Muslim” in *al-Rawḍah*. Thus, a non-Muslim is not appointed over Muslims. This is because Allah Most High says *Allah will never grant non-Muslims triumph over Muslims* (Q4:141), and there is no superior manifestation of triumph than judging. Nor is a non-Muslim appointed over non-Muslims, since the objective of judgment is rendering judgments based on the law, and of which a non-Muslim is ignorant. As for the custom of appointing an individual from among the non-Muslim residents of the Islamic State to govern over themselves, al-Māwardī and al-Rūyānī said that this is a[n appointment for] supervision and political leadership, not an entrustment with authority to govern and judge: the non-Muslim residents are not bound to this individual's judgment because he gives it, but rather, they follow it out of their own voluntary compliance and they are not required to seek judgment from him.⁹

The contemporary *Fiqh Encyclopedia of Kuwait* states that:

Islam is one of the conditions that jurists have stipulated for whoever is appointed to be a judge. It is not permissible to appoint a non-Muslim because Allah Most High has said *Allah will never grant non-Muslims triumph over Muslims* (Q4:141). This applies whether the appointment is to judge between Muslims or adherents of the judge's own religion. However, Abū Ḥanīfah did permit appointing a non-Muslim to judge between members of his own religion, reasoning that since it is permissible for non-Muslim residents of the Islamic State to bear witness for one another, and have authority [as guardians] for marriage, it is also permissible for them to have authority for judging.¹⁰

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- The Mālikīs add: not being morally corrupt, being male, being intelligent and perceptive, having knowledge of the legal subject matter which one has been assigned, and having sight, hearing and speech.
 - The Ḥanbalīs add: being male, morally upright, having hearing, sight and speech, and being a *mujtahid*. In the absence of a fully qualified individual, the most closely qualified will do.

For additional details and references, see *al-Mawsū'at al-Fiqhīyah al-Kuwaitīyah*, ed. Wizārat al-Awqāf wa al-Shu'ūn al-Islāmīyah (Maṭābi'a Dār al-Ṣafwāh li-l-Ṭibā'ati wa al-Nashr wa al-Tawzī', 1995), 33:291.

9. Al-Shirbīnī, *Mughnī al-Muḥtāj*, 4:375.

10. *Al-Mawsū'at al-Fiqhīyah al-Kuwaitīyah*, 33:296.

A judge exercises a great deal of authority over other individuals. This authority comes from the judge being appointed to his position. The Shāfi'ī author al-Malabārī explains who has the authority to make such an appointment:

The appointment must come from the Imām [the single, supreme leader of the Muslim community] or his authorized representative, even if the individual is the only individual qualified to serve as a judge.

If there is no Imām, then the appointment is made by the land's scholars and community leaders – either as an entire group or a subset of them with the consent of the others. If the scholars and community leaders in one part of the land make an appointment, the appointment is valid within that region but not others.¹¹

The second paragraph encompasses two points. The first concerns the general case of appointing judges in the absence of an Imām or sovereign power. The second is that absolute community consensus is not required to appoint a judge; rather, his jurisdiction is defined by the regions that supported him. Imāms Ibn Ḥajar and al-Ramlī – the primary authorities for the late Shāfi'ī school – both wrote about the first of these points.

Ibn Ḥajar wrote in *Tuḥfat al-Muḥtāj*:

When the Sovereign is absent, the prominent individuals in the region (meaning individuals who have power and influence) must choose a judge. His judgments will then be implemented out of necessity. The Imām [al-Juwaynī] in *al-Ghiyāthī* was explicit about this when he discussed at length the case where the Islamic sovereign or his representative loses power in a land or region, quoting [Imām] al-Ash'arī and others. Al-Khaṭṭābī cited as evidence the example of Khālīd bin al-Walīd (may Allah be pleased with him) taking charge without being appointed after those whom the Prophet ﷺ had appointed – Zayd, Ja'far, and then Ibn Rawahah (may Allah be pleased with them) – had all been martyred. Al-Khaṭṭābī said that Khālīd undertook leadership out of fear that it would be lost. The Prophet ﷺ approved of his action which was in agreement with the truth (*al-ḥaqq*). Thus, this became a basis for what to do when a necessity arises, which the failure to address would stand in the way of upholding the religion.¹²

This opinion is also found in the works of early Shāfi'ī scholars. Imām al-Māwardī wrote in his *al-Aḥkām al-Sultānīyah*:

Suppose that the population of a district without a judge agrees to appoint one: that appointment would be invalid if a Sovereign exists at that time; but if no Sovereign exists, the appointment would be valid and the judge's decisions over that population would be enforceable. Should a new ruler come to power after

11. Al-Dumyāṭī, Muḥammad Shaṭā, and Zayn al-Dīn al-Malabārī, *I'ānāt al-Ṭālibīn*, (Cairo: Maktabah wa Maṭba'ah Muṣṭafā al-Bābī al-Ḥalabī, n.d.), 4:210–1.

12. Al-Ḥaythamī, *Tuḥfat al-Muḥtāj*, 7:328–9.

the judge's appointment, the judge may not keep his appointment without the Sovereign's permission, although his earlier verdicts would not be overturned.¹³

Other schools have similar opinions. The Ḥanbalī scholar al-Qāḍī Abū Ya'la wrote in his own *al-Aḥkām al-Sulṭānīyah*:

Suppose that a district without a judge forms a consensus to appoint a judge: if there is a Sovereign, ... then the appointment is invalid; if the Sovereign is absent, ... the appointment is valid and his verdicts are enforceable.¹⁴

The late Mālikī scholar Muḥammad 'Ulaysh wrote concerning the situation of a wife whose husband is missing and cannot be reached. He stated that the wife can bring her case either to the local judge, magistrate, or the general authority who is in charge of water for grazing. In the absence of all three, she can bring her case to a body of righteous individuals of the Muslim community since they take the place of the supreme Muslim authority in his absence.¹⁵

The previous quotations involved cases where Muslim regions are no longer governed by an Imām or Sovereign. It is not certain that the above rulings would apply to the case of Muslims residing in regions which never were governed by an Imām or a Muslim Sovereign in any way. Other quotations do mention this specific case, however, and give similar answers, thus providing a basis for such Muslim communities to appoint a judge whose decisions are binding.

The Shāfi'ī scholar al-'Izz ibn 'Abd al-Salām examined a related scenario and explained how it fits into the major universal objective in Islam of avoiding harm and obtaining well-being (*daf' al-ḍarar wa jalb al-maṣāliḥ*):

Suppose that non-Muslims take over a large region and assign someone to the courts who looks after the general welfare of Muslims. The apparent legal ruling in the school (*al-zāhir*) is that this [appointment] is enforceable on the basis of promoting universal well-being and warding off all-encompassing harm. The Lawmaker's mercy and concern for the needs of His servants are far removed from nullifying universal well-being and enduring all-encompassing harm which may result from any shortcomings in the person who appointed a qualified person to be judge...¹⁶

While the wording here is ambiguous concerning the religion of the person appointed to serve as judge, al-Khaṭīb al-Shirbīnī and other later Shāfi'ī scholars presented a variation of al-'Izz's scenario which clarifies the matter: "Suppose that non-Muslims take over a large region and appoint a Muslim man as judge. The apparent legal ruling in the school is that

13. Al-Māwardī, 'Alī bin Muḥammad, *al-Aḥkām al-Sulṭānīyah wa al-Wilāyāt al-Dīnīyah*, ed. 'Iṣām al-Ḥarastānī, and Muḥammad al-Zughlī (Beirut: al-Maktab al-Islāmī, 1996), 1:123–4.

14. Copied from Bin Bayyah, Abdullah, *Ṣinā'at al-Fatwā* (Beirut: Dār al-Minhāj, 2007), 273.

15. 'Ulaysh, *Sharḥ Manāḥ al-Jalīl*, 2:385.

16. Ibn 'Abd al-Salām, al-'Izz, *Qawā'id al-Aḥkām fī Maṣāliḥ al-Anām* (Damascus: Dār al-Ṭubbā', 1992), 1:128.

[the appointment] is effective.”¹⁷

The Ḥanafī scholar Ibn ‘Ābidīn included and affirmed the following quotation in his *Hāshiyah*:

In regions that are under the authority of non-Muslims, it is permissible for Muslims to hold Friday and Eid Prayers, and their judge becomes a judge through Muslim consent. It is obligatory for them to request that a Muslim be placed in authority over them.¹⁸

Mālikīs agree with the idea of community-appointed judges. Indeed, some late Mālikī scholars are of the opinion that community-appointed judges have the authority to carry out punishments in non-Muslim regions and in situations where existing Muslim authorities shirk their obligation to apply the Shari‘ah.¹⁹ Ḥanafīs, Shāfi‘īs, and Ḥanbalīs, however, do not give such wide authority to community-appointed judges in non-Muslim regions.

The early Shāfi‘ī scholar al-Māwardī points out that a judge’s appointment can be limited to a specific type of case or even to one specific case.²⁰

3. Arbitration (*taḥkīm*)²¹

In voluntary arbitration, disputing parties appoint an arbitrator to decide their case. The linguistic meaning of “*taḥkīm*” is designating someone as a judge and appointing him to decide the matter. The textual basis for arbitration comes from the Qur’an, where Allah Most High says: *And if ye fear a breach between them (the man and wife), appoint an arbitrator from his folk and an arbitrator from her folk* [Q4:35]. Concerning this verse, al-Qurṭubī said: “This verse is proof that arbitration is established [in the religion].”²² It is also affirmed in the actions of the Prophet ﷺ in that he was pleased by the arbitration performed by Sa‘d bin Mu‘adh (may Allah be pleased with him) in the matter of Banī Qurayzah.²³

Arbitration tends to be mentioned alongside settlement by an appointed judge (*qaḍā*). But arbitration is a lesser form of dispute resolution, inasmuch as it is undertaken pursuant to private authority, whereas settlement by an appointed judge is performed pursuant to public authority.²⁴ All four extant classical schools of law include some form of arbitration, though the Shāfi‘ī school offers the most universal solution.

17. Al-Shirbīnī, *Mughnī al-Muḥtāj*, 4:132. c.f. al-Ramlī, *Nihāyat al-Muḥtāj*, 7:412 in al-Shabrāmulsī’s *hāshiyah*; al-Ḥaythamī, *Tuḥfat al-Muḥtāj*, 9:78 in Sharwānī’s *hāshiyah*.

18. Ibn ‘Ābidīn, *Hāshiyah Radd al-Muḥtār*, 3:256.

19. Al-Wansharīsī, *al-Mi‘yār al-Mu‘rib*, 10:102–3.

20. Al-Māwardī, *al-Aḥkām al-Sulṭānīyah*, 118, 120.

21. Al-Ramlī, *Nihāyat al-Muḥtāj*, 8:207; Ibn ‘Ābidīn, *Hāshiyah Radd al-Muḥtār*, 5:453; al-Buhūti, *Kashshāf al-Qinā’*, 5:269; ‘Ulaysh, *Sharḥ Manah al-Jalīl*, 5:153; al-Ḥaythamī, *Tuḥfat al-Muḥtāj*, 10:144; al-Jamal, *Hāshiyat al-Jamal*, 5:339; al-Shirbīnī, *Mughnī al-Muḥtāj*, 4:506.

22. Al-Qurṭubī, *al-Jāmi‘ li-Aḥkām al-Qur‘ān*, (Dār al-Kutub al-Miṣriyah, n.d.), 5:179.

23. Al-‘Asqalānī, Ibn Ḥajar, and Muḥammad bin Ismā‘īl al-Bukhārī, *Fath al-Bārī Sharḥ Ṣaḥīḥ al-Bukhārī*, (al-Maktabah al-Salafiyah, n.d.), 6:165.

24. Ibn ‘Ābidīn, *Hāshiyah Radd al-Muḥtār*, 5:428.

According to the Shāfi‘ī school, it is permissible for two or more people to select a qualified arbitrator to judge between them in a matter that involves rights or obligations owed to specific individuals. If the region already has an appointed judge, then the arbitrator must be qualified to serve as a judge; this prerequisite is waived if no appointed judge exists in the region.

Arbitration is limited to matters involving rights or obligations owed to specific individuals (*ḥaqq al-ādamiyyīn*), which includes financial matters and marriage. Although arbitration is an option for retaliatory punishments and accusations of fornication (*qadhf*) as each involves a right claimable by the accused against the accuser, the use of arbitration in such cases is limited to establishing rights and financial rewards: it does not justify physical punishment. Furthermore, arbitration is not possible for other prescribed punishments (*ḥudūd*) like drinking wine, or for disciplinary punishments (*ta‘zīr*), since that retribution is owed to society at large and not to a specific individual.

The arbitrator’s decision is not effective unless the appointing parties assent to it prior to its issuance. If one of the appointing parties is himself a judge, the arbitrator’s decision is effective immediately since the arbitrator is considered here to have been appointed to serve as a judge.

It is not permissible for an arbitrator to rely upon his own personal knowledge of the case. He must instead rely only upon the evidence which is presented to him.



This brief introduction to the various models for dispute resolution shows that Muslims living in non-Muslim regions do, in fact, have options for Shari‘ah-based dispute resolution. The applicability of each of model to these Muslims’ situation will be the subject of the next section.

STRATEGY FOR NON-MUSLIM REGIONS

Each of the means to dispute resolution mentioned above is appropriate for different situations and each has its own limitations. With respect to Muslims living in non-Muslim regions:

- Private settlement (*ṣulḥ*) is appropriate for situations where the concerned parties can agree upon a solution together and in private, without involving a third party. However, it is applicable only to a small range of personal disputes and cannot resolve disputes where one of the parties involved remains adversarial.
- Settlement through a community-appointed Islamic judge or court (*qaḍā*) is appropriate for situations where one of the concerned parties refuses to acknowledge or resolve a dispute, and where there is broad community support for one or more qualified individuals to serve in this capacity. However, to ensure that positions are not abused, stringent measures must be taken to ensure that only qualified individuals are allowed to participate

as members of the court and that proper procedures are being followed. Appointing members on a case-by-case basis or limiting their appointment to a specific type of case would also further reduce the possibility of abuse. Finally, obtaining broad community support may prove too difficult for settlement to be a viable option.

- Arbitration (*taḥkīm*) is appropriate for situations where the concerned parties cannot agree upon a solution together in private, but can agree to voluntarily bind themselves to the decision of a third party who will arbitrate their case according to the Shari'ah. A binding and valid arbitration requires the arbitrator, two parties, and a voluntarily binding agreement.

In practice, things are more complicated for Muslims living in non-Muslims regions who find themselves operating within multiple judicial systems: that of the local sovereign land and that of their Creator (i.e., the Shari'ah). Even though this conflict is not apparent for most daily affairs, it is conspicuous in matters of family law and inheritance because the Shari'ah considers these religious matters, whereas the local law of the land considers them as falling within its domain.

Although it is possible for Muslims to conduct marriage and divorce according to the Shari'ah without involving the local civil authorities, local laws and benefits may require that a marriage be registered with those authorities. Once the marriage has been so registered, those same authorities will also be involved in any dissolution of that marriage. Many Muslims residing in non-Muslim regions consider the Shari'ah marriage contracts and dissolution to be the actual and effective instrument and that any civil involvement is simply a bureaucratic formality. True as this may be, it has significant and tangible consequences since a Muslim male who does not end his civil marriage with a civil divorce before entering into a new Shari'ah-valid marriage would still be considered legally married and, thus, could be charged with adultery, unlawful cohabitation, or polygamy.

Matters such as this fall within the arena of conflict of laws, a complex topic which is beyond the scope or needs of this Brief. What suffices here is for us to recognize that Muslims residing in non-Muslim regions operate in an environment where they find themselves accountable to both the Shari'ah and the local laws for a single action, and that this dual accountability complicates the issue of resolving personal disputes. Most Muslims are not aware that the Shari'ah offers means for binding dispute resolution that can operate in non-Muslim regions and, due to this lack of awareness, they are left with no option other than private settlement (*ṣulḥ*) or the local courts. Even in the rare case where arbitration (*taḥkīm*) or judgment (*qaḍā*) through a community-appointed judge are available, an additional complication may occur when one party refuses out-of-court resolution completely, or does agree to it initially but then refuses to abide by the resolution – leaving many Muslim disputes in a state of deadlock.

The true problem here is finding ways to turn settlements resulting from arbitration (*taḥkīm*) and appointed judges (*qaḍā*) into something that is legally effective and binding according to the local law. One of the most promising ways in which to do this is alternative dispute resolution.

Alternative dispute resolution (ADR) refers to all methods of resolving disputes short of litigation, including arbitration. Each country has its own laws concerning ADR. Although there has been resistance to ADR historically, it has recently gained widespread acceptance among both the general public and the legal profession. While local arbitration laws typically do not allow arbitration alone to effect a divorce, they do often allow arbitration to determine collateral issues arising from a divorce (e.g., division of assets, child custody, support).

Voluntary binding arbitration has been and continues to be used effectively by Post-Diaspora Jewish communities for personal status and marriage issues. Their solution rests upon a pre-nuptial (or post-nuptial) agreement that either spouse can call for voluntary binding arbitration by a designated arbitrator, with a stipulated daily penalty for a spouse refusing the arbitration. It would not be difficult for Muslims in non-Muslim countries to employ a similar solution.

Muslims residing in non-Muslim regions where local laws allow alternative dispute resolution should research the possibility of implementing Shari'ah-based systems of arbitration (*taḥkīm*) and settlement by an appointed judge (*qaḍā*) as types of voluntary binding arbitration. This will require experts in the Shari'ah and the local law to develop procedures to ensure that decisions are binding and enforceable in the local courts, and that arbitration is performed in a manner that is harmonious to and respectful of both the Shari'ah and the local legal system.

It may be best to concentrate on arbitration (*taḥkīm*) since, when compared to settlement by an appointed judge (*qaḍā*), the conditions for arbitration are easier to meet and it poses little risk of abuse. Furthermore, since arbitration, as defined in the Shari'ah, is voluntary and cannot result in physical punishment, and it would be working within the local legal system, it is also easier to avoid accusations that it is an attempt to impose Shari'ah or subvert local laws.

An ideal solution would be to develop an institute for the sole purpose of offering Shari'ah-based alternative dispute resolution. The primary tasks of such an institute would include:

- Determining how arbitration (*taḥkīm*) and settlement by an appointed judge (*qaḍā*) would work within local alternative dispute laws.
- Establishing procedures to be followed during arbitration, guidelines for admissible evidence, and clarifying the necessary qualifications for its participants.
- Providing agreements (e.g., pre- and post-nuptial agreements) for voluntary binding arbitration through a designated institute or one of its recognized affiliates.
- Providing contracts (e.g., marriage contracts) that ensure Shari'ah-compliance, include an arbitration clause, and are recognized by the local law.
- Offering arbitration services following a well-defined procedure with a clear set of objective criteria.

- Pushing for public awareness of Shari'ah-compliant alternative dispute resolution.
- Serving as expert witnesses in court cases.

Additional tasks might include:

- Training and certifying associates to carry out arbitration.
- Providing advice on implementing wills and dividing inheritance in accordance with the Shari'ah.
- Offering mediation and negotiation services.

Such an institute would require staff whose skills include expertise in Shari'ah law, the local legal system, and training in arbitration, mediation, and negotiation. Given the rarity of qualified Shari'ah specialists, it would make sense for the institute to be affiliated with a Muslim seminary or similar educational programs, or a Shari'ah standards advisory group.

Currently, the most urgent cases involve Muslim wives who are unable to obtain a justified dissolution of marriage, so it is appropriate to offer the following suggestions:

(1) *In cases where a voluntary arbitration agreement does not already exist and the husband does not wish to cooperate*, it may be possible to convince him by pointing out that if he leaves the entire process to the local courts, he is likely to receive a less favorable settlement than if he agreed to voluntary binding arbitration where that process would decide whether he would pronounce divorce (*ṭalāq*) or accept her request for dissolution (*khul'*), how assets would be divided, child custody, and support.

Once an arbitration ruling has been issued, the institute could issue a temporary document attesting that the decision will not be final until the civil divorce has been completed. Upon its completion, a new document can be issued attesting that the divorce has been completed according to both the Shari'ah and civil law, and the wife is free to marry again once she completes her waiting period.

(2) *In cases where the husband's permission cannot be obtained* (either he is obstinate or his whereabouts are unknown or he refuses to communicate), there should be a set of contingency solutions that do not require his explicit permission. These contingency solutions are intended to be used only as a means of last resort, after a thorough investigation of the circumstances proves that the request is justified.

These solutions would include finding ways to annul the marriage that can be rendered effective without requiring a Muslim judge (c.f., the Shāfi'ī ruling concerning a wife whose husband's whereabouts are unknown and who has left her with no means for her required maintenance²⁵). If a community-appointed judge is available, then these solutions may also include other methods of dissolution that do require a ruling by a Muslim judge, in order

25. Al-Dumyātī, *I'ānāt al-Ṭālibīn*, 4:89–91.

to be effective (e.g., in cases of physical or mental abuse, finding a fault with the marriage contract which renders it invalid).

Once an appropriate solution has been chosen, the wife would be informed of her rights within the Shari'ah and advised to bring her case to the local courts so that she can obtain these rights.²⁶ After the case has been settled in court, the arbitration institute can issue a document attesting to the finality of the divorce, explain the basis for the decision, and indicate that the non-Shari'ah court was used as a means to obtain what the Shari'ah had already granted, and that the woman is free to remarry once she completes her waiting period. Such a solution honors the primacy of Shari'ah while respecting the local law.



The Shari'ah offers Muslims living in non-Muslim countries several options for resolving personal disputes. In locations where the local law permits alternative dispute resolution (ADR), there may be an opportunity to apply these Shari'ah-based options within the ADR framework. These options and this opportunity must be exhausted before there is justification to resort solely or directly to non-Muslim courts.

Conclusion: Classical Islamic law provides several options for resolving personal disputes, including private settlement (*ṣulḥ*), settlement by an appointed judge (*qaḍā*), and arbitration (*taḥkīm*). Many non-Muslim countries allow for an ADR process, thus creating an opportunity to apply these Shari'ah-based means within the local legal system. One of the solutions (voluntary binding arbitration) is already being used effectively by religious communities to deal with divorce issues similar to the ones faced by Muslims living in non-Muslim countries. Establishing such a solution will require research and planning. Shari'ah scholars would play a major role in setting policy, and drafting procedures, criteria, and contingency plans. Local legal specialists would play a major role in drafting and maintaining binding agreements, as well as with parts of the arbitration process and settlement. Such an investment will do much to ease the hardships faced by Muslims living in non-Muslim countries, as well as to show that Shari'ah law can coexist within the bounds of local legal framework.

26. A basis for this can be found in the writings of the early Shāfi'ī scholar al-Māwardī who stated that it is permissible to assign executive authority to a non-Muslim resident of the Islamic state since carrying out judgments, in contrast to making them, does not require that one know the Shari'ah. Al-Māwardī, *al-Aḥkām al-Sulṭānīyah*, 46.

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